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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. ~~828~~ 90

JAMES ZARICHNY,

Petitioner,

vs.

STATE BOARD OF AGRICULTURE AND SARAH VAN HOOSEN JONES, WINIFRED G. ARMSTRONG, FOREST H. AKERS, FREDERICK H. MUELLER, CLARK L. BRODY, ELLSWORTH B. MORE, MEMBERS OF THE STATE BOARD OF AGRICULTURE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND SUPPORTING BRIEF.

W. G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

OTHER AUTHORITIES CITED

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND SUPPORTING BRIEF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

James Zarichny, petitioner, respectfully shows:

I

Summary and Short Statement of Matter Involved

Petitioner, a resident of Michigan, entered Michigan State College of Agriculture and Applied Science (hereinafter for brevity referred to as Michigan State College)

as an engineering student. Michigan State College is a constitutional college (Michigan Constitution Art. XI, Section 10) maintained by the State of Michigan and the individual respondents constitute a body corporate and the governing body of the college (2b. Sec. 7).

Petitioner continued his studies at the College (in the meantime transferring to the mathematics department) until February, 1943 when he entered the Army of the United States. In January, 1946 after 22 months of overseas service, petitioner was honorably discharged from the army and in April, 1946 re-enrolled in the College as a mathematics student.

Petitioner was a student member of an organization known as the Spartan Chapter of American Youth for Democracy. In November, 1946 the College Student Council revoked the organization's permission to meet. Following this on February 7, 1947 all members of the organization including petitioner were placed on strict disciplinary probation for an indefinite period by John A. Hannah, President of the College. The terms of probation were that petitioner was not to participate in any extra-curricular activities or represent Michigan State College on any forensic or other team, be a member of any college musical organization or participate in any activities of any student organization. The letter advising him of this action (Exhibit 1, p. 5) warned him that if he participated in any activities of the AYD organization so long as it remained an unrecognized student organization, he would thus automatically suspend himself and would no longer be a student of the College. The letter further informed him that "any political beliefs that you may hold play no part in this action, and the Faculty Committee and the College have not been concerned with your membership in any political party or your allegiance to any particular political group."

At the end of the spring term, 1947, the Dean of Students suggested to petitioner that he withdraw from the College and not return the following term but petitioner refused to withdraw and he returned to the school in the fall of 1947. By letter dated December 18, 1948 petitioner was advised by the Dean of Students that it had been determined that he had violated the terms of his probation and therefore would not be permitted to re-enroll as a student at the College (Exhibit 2, p. 6). Petitioner by letter inquired as to the reason or reasons why he would not be permitted to re-enroll (Exhibit 3, p. 7) but received no answer. At this time petitioner had one-quarter semester of the academic year remaining to be completed before fulfilling the requirements for a diploma and his scholastic standing was above the minimum required for graduation.

On January 12, 1949 petitioner seeking reinstatement filed a petition for writ of mandamus in the Michigan Supreme Court. The petition alleged the facts substantially as set forth above, charged that respondents acted arbitrarily, unreasonably and illegally and among other things had acted in violation of the First, Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article II, Sections 2, 4 and 16 of the Constitution of the State of Michigan.

The petition for writ of mandamus was summarily denied without opinion by the Michigan Supreme Court on January 13, 1949, the day following its filing. No answer to the petition was filed. On January 20, 1949 motion for reconsideration was filed and request for oral argument made under the statute (C. L. '29, Sec. 13531; M. S. A. 27.25) and the court rule (Michigan Court Rules, Rule 10, Sec. 4) which provide for oral arguments in cases involving constitutional questions or personal liberties. After the filing of motion for reconsideration respondents filed a motion to dismiss

the petition for writ of mandamus and answer alleging substantially that petitioner was put on probation for participating in activities of an organization (AYD) which had not been approved by the Student Council and that members of that organization had circulated handbills at an on-campus rally advocating an FEPC for Michigan and that he had been expelled for arranging a meeting at which the leader of the Michigan Communist Party and one of the twelve Communists under indictment in New York was the principal speaker. The meeting was held off the campus but in a building across the street from the campus frequently used by student groups. Petitioner filed a reply to the answer admitting that he had assisted in arranging a place for the meeting referred to and that he had attended the meeting as a spectator; that during the meeting in reply to a suggestion made by a non-student, petitioner rose and spoke against any appeal for funds being made to student organizations on the ground that such appeals would only produce trouble.

In the reply petitioner further stated that the meeting in question was not sponsored by any student organization but was sponsored and held under the auspices of the Ingham County Civil Rights Committee, the majority of the members of which were non-students. Petitioner further alleged that his attendance at the meeting was in nowise connected with his status as a student and was not a student activity, but was a matter relating to his private and personal life not subject to regulation or control by respondents and that his expulsion from College for attending or participating in said meeting constituted an invasion and deprivation of his constitutional rights.

On March 3, 1949 the Michigan Supreme Court affirmed its former order denying the petition and stated that the

court rule above mentioned had no application to the case. No opinion was filed and no hearing held.

Basis of Jurisdiction

Jurisdiction of this Court is invoked under Section 1257, Title 28, United States Code.

Questions Presented

1. Under the circumstances outlined was the expulsion of petitioner from Michigan State College an unlawful invasion and deprivation of his constitutional rights of free speech and assembly under the First Amendment to the United States Constitution?

2. Was petitioner deprived of his liberty and property without due process of law contrary to the prohibition of the Fifth Amendment to the United States Constitution in being expelled from Michigan State College for attending an off-campus civic meeting?

3. Was petitioner's privileges and immunities as a citizen of the United States abridged by the State of Michigan and was he denied equal protection of the laws and deprived of his liberty and property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States?

4. Were the facts and circumstances under which petitioner was placed on probation and subsequently expelled from Michigan State College so unreasonable, arbitrary and unjust as to amount to a denial of petitioner's constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution?

Reasons Relied On for Allowance of Writ

1. The Michigan Supreme Court in denying petitioner relief on his petition for writ of mandamus has decided adversely to him a substantial federal question involving civil rights under the Bill of Rights not heretofore specifically determined by this Court.

2. The Michigan Supreme Court in denying petitioner relief has decided federal questions with respect to the constitutional rights of freedom of speech and assembly guaranteed by the First Amendment to the United States Constitution in a way probably not in accord with applicable decisions.

3. In denying petitioner relief, the Michigan Supreme Court without affording him a hearing has decided federal questions involving due process and the privileges and immunities of citizens of the United States under the Fifth and Fourteenth Amendments to the United States Constitution in a manner probably not in accord with applicable decisions of this Court.

WHEREFORE, Petitioner Prays:

1. That a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of Michigan commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said court had in case numbered 44341½ wherein James Zarichny is plaintiff and State Board of Agriculture, *et al.* are defendants, to the end that said cause may be reviewed and determined by this Court as provided for by the statutes of the United States.

2. That the order and judgment of the Supreme Court of the State of Michigan in said cause may be reversed by

this Court and such further proceedings had or order or judgment entered as this Court may determine.

3. That petitioner may have such further relief in the premises as this Court may deem just and proper.

JAMES ZARICHNY,
Petitioner,

By G. LESLIE FIELD,
Attorney for Petitioner,
415 Dime Building,
Detroit 26, Michigan.

Dated May 27, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

No opinions were filed by the Michigan Supreme Court in denying petitioner's application for writ of mandamus and his motion for reconsideration of such order. Neither order is reported.

Jurisdiction

The order of the Michigan Supreme Court denying petitioner's motion for reconsideration of order denying his application for writ of mandamus is dated and was entered February 28, 1949.

Section 1257(3), Title 28, U. S. C. is believed to sustain jurisdiction of the Court herein.

Statement

Petitioner enrolled as an engineering student at Michigan State College of Agriculture and Applied Science in September, 1941, later transferring to the mathematics department (R. 9). He left the College in February, 1943 to enter the U. S. Army and after 22 months overseas service he was honorably discharged and re-enrolled at the College in April, 1946 (R. 1, 9). It is not claimed that petitioner's scholastic work was below passing standards or insufficient to warrant his graduation upon completion of his course of study or of such a character as to warrant either placing him on probation or expelling him (R. 14).

In the spring of 1946 an organization known as the "American Youth for Democracy" of which petitioner was a member applied to the Student Council of the College for permission to carry on its program on the campus (R. 11).

It was one of two or three groups seeking recognition on the basis of veterans problems such as housing, racial equality and the like. Permission was granted to hold one or two meetings on the campus during the summer on a probationary basis but in the fall of 1946 the Student Council refused to approve the AYD as a permanent college organization but extended recognition to the Spartan Citizens Committee which was said to have proposed an approximately parallel program (R. 11).

On February 6, 1947 the President of the College notified six members of the Spartan Chapter (the college chapter) of AYD including petitioner that they were placed on strict disciplinary probation for an indefinite period for continued participation in AYD activities after it had been refused recognition by the Student Council (R. 2, 5:Exh. 1). The activities leading to the imposition of probation consisted of continuing as an organization and circulating handbills advocating a FEPC for Michigan at an on-campus college approved student rally called in support of an FEPC bill then pending before the Michigan Legislature (R. 12).

The terms of petitioner's probation were a) that he was not to participate in any extra-curricular activities or represent the College on any forensic or other team or be a member of any college musical organization, and b) that he was not to participate in the affairs of any student organization. Petitioner was warned that participation by him in any activities of AYD so long as it remained unrecognized would result in "automatic" suspension from the College)R. 5:Exh. 1).

It is alleged by respondents (R. 12-13) but denied by petitioner (R. 15) that during the spring 1947 term petitioner had been distributing literature of the Communist Party and it was suggested to him by the Dean of Students that he withdraw from the College and transfer to some other

institution (R. 2, 13). Petitioner declined the suggestion and re-enrolled in the fall still under probation though all the other students placed on probation had been released from probation (R. 13, 15).

In the spring of 1948 petitioner was found guilty of contempt of the Michigan State Senate in refusing to answer questions before a Senate Committee created by the Callahan Act (Act 270 P. A. Mich. 1947) as to whether or not he was a member of the Communist Party (R. 13). This event was not considered a violation of probation and petitioner was permitted to continue as a student.

On December 6, 1948 a public meeting was held at College House, a building off-campus but directly across the street from it the use of which by student groups is encouraged by the College. At this meeting Carl Winter, leader of the Michigan Communist Party and one of the twelve Communist leaders under federal indictment in New York, was the principal speaker. Petitioner attended this meeting (R. 13-14). It is the contention of respondents that petitioner arranged the meeting, planned and conducted the program and made an appeal to the audience for cash contributions to aid in the defense of the indicted men. Petitioner denied these contentions and alleged that he was only a spectator at the meeting; that when a non-student made an appeal for contributions to a defense fund, he spoke against the appeal; that he assisted in making arrangements for the place of the meeting and that it was sponsored by the Ingham County Civil Rights Committee, an association of people, including some college students, in the county interested in the protection and preservation of civil rights (R. 15, 16).

On this important point petitioner further alleged that his attendance at this meeting was a matter relating to his personal private life and was in nowise connected with

his status as a student, and was not a student activity curricular or extra-curricular as the great majority of the civil rights committee that sponsored the meeting were non-students. He further stated: "Petitioner's right to attend, or even to arrange for, the session and plan and conduct the program as alleged by the defendants was not subject to regulation or control by defendants (respondents) and the forbearance from such activity on the part of petitioner could not lawfully be made a condition of his continued admission as a student at the Michigan State College of Agriculture and Applied Science, such condition constituting an invasion and deprivation of petitioner's constitutional right as set out in the petition heretofore filed" (R. 16).

By letter dated December 10, 1948 not specifying the nature of the alleged violation of the terms of his probation and without a hearing, petitioner was notified by the Dean of Students that he had violated the terms of his probation and would not be permitted to re-enroll as a student at the College (R. 6:Exh. 2).

Petitioner's subsequent attempt to obtain reinstatement through mandamus proceedings in the Michigan Supreme Court was unsuccessful and his application for a writ of mandamus was denied without hearing (R. 7) as was his motion for reconsideration of the order of denial (R. 17).

Specification of Errors

1. The Supreme Court's denial of petitioner's application to obtain reinstatement in Michigan State College by writ of mandamus contravenes the freedom of speech and assembly guarantees of the First Amendment to the United States Constitution, the due process provision of the Fifth Amendment and the due process, privilege and immunities, and equal protection of the law provisions of the Fourteenth Amendment.

2. The Michigan Supreme Court's order and judgment denied petitioner's constitutional rights under the First, Fifth and Fourteenth Amendments to the United States Constitution.

3. The Michigan Supreme Court erred in failing to hold that the expulsion of petitioner from Michigan State College was arbitrary, unreasonable and in contravention of his constitutional rights of freedom of speech and assembly, a deprivation of his liberty and property without due process of law, a denial of his right to equal protection of the laws and an abridgment of his privileges and immunities as a citizen of the United States, contrary to the provisions of the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The Michigan Supreme Court erred in refusing to reinstate petitioner as a student in Michigan State College.

Summary of Argument

Petitioner's only remedy was by original proceedings in the Michigan Supreme Court by mandamus to secure his reinstatement in the College. The decisive issue is whether a state owned and administered land grant college may impose disciplinary restraints upon students in connection with off-campus activities the effect of which is to deny to such students the rights of free speech and assembly guaranteed by the First Amendment to the United States Constitution and to expel students for failing to conform to such restraints. It is contended that the expulsion of petitioner was an unreasonable and arbitrary act and that the college authorities had no right to expel petitioner for exercising his constitutional rights of free speech and assembly by attending a public meeting off-campus to consider civil rights and participating therein.

Argument

Petitioner's only remedy was by mandamus in the Michigan Supreme Court. Michigan Constitution, Article VII, Sec. 4; Mich. Comp. Laws, 1929, Section 13535, Stat. Ann. 27.29; Mich. Comp. Laws, 1929, Section 15186, Stat. Ann. 27.2230; *Holman* v. *Trustees of School District No. 5,* 77 Mich. 605; *Workman* v. *Board of Education,* 18 Mich. 399; *Reed* v. *Civil Service Commission,* 301 Mich. 137; *Thompson* v. *Auditor General,* 261 Mich. 624. Under the Michigan Constitutional provision referred to, the Supreme Court had jurisdiction to issue the writ applied for and to hear and determine the same.

There is no question but what the governing authorities of a state university may make reasonable rules and regulations for the orderly management of the school and the preservation of discipline therein and unless such rules are arbitrary or unreasonable the courts will not interfere. *Waugh* v. *Board of Trustees,* 237 U. S. 589. Whether such rules and regulations are wise or expedient or their aims worthy is a matter left solely to the discretion of the authorities and with the exercise of such discretion the courts will not interfere in the absence of arbitrary action or abuse of discretion. *Gott* v. *Berea College,* 156 Ky. 376; *Woods* v. *Simpson,* 146 Md. 547, 39 A. L. R. 1016; 55 Am. Jur. 14. It is recognized that students may be made to observe rules and regulations which could not be imposed upon people in general. *Gott* v. *Berea College, supra; Connell* v. *Gray,* 33 Okla. 591. However rules and regulations which are against common right or palpably unreasonable may be annulled by the courts. *State ex rel. Stallard* v. *White,* 82 Ind. 278; *Connell* v. *Gray, supra.*

Thus in *Booker* v. *Grand Rapids Medical College,* 156 Mich. 95, it was held that a student who has been admitted

to the college and has paid the fees for the first year's instruction had a contract right to continue until he, in regular course, attains his diploma and he cannot arbitrarily be dismissed at the close of a year merely because he is obnoxious to other students. See also *Baltimore University* v. *Colton,* 98 Md. 623.

It is clear that a rule or regulation that contravenes constitutional rights is void. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. It is admitted that petitioner was expelled for attending and participating in a public meeting off campus and for no other reason. Such action on its face is void as it punished acts within the guarantee of free speech and assembly contrary to the First and Fourteenth Amendments to the United States Constitution. *Winters* v. *People of State of New York,* 333 U. S. 507. See *Kovacs* v. *Cooper,* 69 S. Ct. 448; *Bridges* v. *Wixon,* 326 U. S. 135; *Thomas* v. *Collins,* 323 U. S. 516.

It is admitted that petitioner was expelled without a hearing. He was thus deprived of a valuable property right (*i. e.* to receive his degree) on the very eve of his graduation (he had one-quarter of a semester to go to complete his course) without any opportunity to be heard in his own defense. *Tanton* v. *McKenney,* 226 Mich. 245 at 252. See *Holman* v. *School District, supra.*

There is no conceivable reason why students should be excluded from the benefits and rights guaranteed by the Constitution and particularly the First Amendment. On the contrary there is every reason for including them as an essential part of their education and training is predicated upon the basic democratic processes inherent in the free speech concept. This contention is ably expressed in the following quotation from "Higher Education for American Democracy, Vol. I, Establishing the Goals", a Report of

the President's Commission on Higher Education, 1947: p. 14:

> "This integration of democratic principles into the active life of a person and a people is not to be achieved merely by studying or discussing democracy. Classroom teaching of the American tradition, however excellent, will not weave its spirit into the innermost fiber of the students. Experience in the give and take of free men in a free society is equally necessary. Democracy must be lived to be thoroughly understood. It must become an established attitude and activity, not just a body of remote and abstract doctrine—a way for men to live and work harmoniously together, not just words in a textbook or a series of slogans.
>
> "To achieve such practice in democratic action the President's Commission recommends a careful review of administrative policies in institutions of higher education. Revision may be necessary to give students every possible experience in democratic processes within the college community. Young people cannot be expected to develop a firm allegiance to the democratic faith they are taught in the classroom if their campus life is carried on in an authoritarian atmosphere."

Conclusion

The subject of academic freedom with specific reference to the conflict between the guarantees of the First Amendment and the right to impose disciplinary regulations and sanctions upon students in state educational institutions stands sorely in need of definition and clarification by this Court. Upon this record, it is earnestly contended that the writ of certiorari prayed for should be granted.

Respectfully submitted,

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INDEX

Subject Index

Statutes Cited

Constitutions Cited

Text Books Cited:

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BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

No opinions were filed by the Michigan Supreme Court in denying petitioner's petition for writ of mandamus nor was an opinion filed by that Court in denying petitioner's motion for reconsideration of that order. Neither of said orders is reported.

II

Counter-Statement on Jurisdiction

Respondents contend that the orders of the Michigan Supreme Court denying petitioner's petition for a writ of mandamus in that Court present no reviewable judgment or decree under *Section 1257, Title 28, U. S. C.*, that this conclusion necessarily must follow from the fact that there is no indication in the record that the orders of the Michigan Supreme Court necessarily involved the decision of any federal questions in denying petitioner's application for writ of mandamus, and his motion for reconsideration of said order of denial; that the orders of the Court below may very well have been based upon questions of substantive law and procedure entirely independent of any federal questions sought to be raised by the petitioner; that entirely apart from the foregoing considerations, the record discloses no substantial federal question requiring a decision by this court.

Finally respondents submit, alternatively, that if petitioner's application for mandamus in the State Supreme Court can be said to have presented any federal questions in that forum and that the Michigan Supreme Court necessarily passed upon said question, its decision against the contentions of petitioner was entirely correct on the merits.

III

Argument

It is the position of the respondents that the petition for writ of certiorari should be denied for the following reasons:

1. Plaintiff, in his petition for writ of certiorari, fails to show that this Court has jurisdiction under *Section 1257 (3), Title 28, U.S.C.* and the record before this Court is substantively deficient in establishing jurisdiction in this Court on the basis relied upon by the petitioner.

It is axiomatic that before this Court will entertain a petition for certiorari to be directed to the Supreme Court of the State of Michigan, it must affirmatively appear from the record below, either expressly or by necessary inference, that federal questions were properly presented in the Court below and that the federal questions so presented were so directly involved that the Supreme Court of Michigan could not have given its judgment without deciding such federal questions. *Cyc. of Fed. Procedure (2nd Ed.) Vol. 10, Sect. 4989, P. 422; Lynch vs. New York Ex rel, Pierson, 293 U. S. 52, 79 L. Ed. 191.* It is equally beyond question that where the record shows or will sustain the inference that the decision of the Court below rested upon independent questions not federal in character and that a decision of such questions would be sufficient to support the judgment rendered, the decision of the State Court is not properly reviewable by this court. *Cyc. of Fed. Procedure (2nd Ed.) Sect. 4993, P. 441; U.S. vs. Hastings, 296 U.S. 188, 80 L. Ed. 148.* Respondents contend that the record in the proceedings below amply justify the inference that the decision of the Michigan Supreme Court may well have been

based upon non-federal grounds amply sufficient to warrant its decision as expressed in its orders denying petitioner's application for mandamus.

It is entirely probable, and may reasonably be inferred that the Michigan Supreme Court refused to grant petitioner's application for mandamus simply because it did not appeal to the discretion of the State Court. It is well settled in Michigan law that mandamus is a discretionary writ and may be withheld in the sound discretion of the State Courts. *St. Ignace City Treasurer vs. Mackinac County Treasurer, 310 Mich. 108, 16 N.W. (2nd) 682.* The discretionary nature of mandamus is well established in other jurisdictions, and in particular it is well established in original proceedings instituted in State Courts of last resort. *34 Amer. Juris., Sect. 26, P. 824-825.* The withholding of writs of mandamus by State Courts of last resort is particularly marked in cases where the original jurisdiction of such Courts is sought and purely private rights are in issue. *34 Amer. Juris. Sect. 27, P. 825.* The simple denial without opinion of petitioner's application for mandamus does not support his contention that such action by the Supreme Court of Michigan necessarily passed upon any or all of the allegedly federal questions which petitioner sought to raise in his application to the State Court. This is well indicated in *Hoffman vs. Silverthorn, 137 Mich. 60, 100 N.W. 183,* involving a summary denial of a writ of mandaums without opinion. The Michigan Supreme Court on Page 64 of its opinion said,

> "If the decision in the mandamus proceeding was made upon the merits, we think that decision would be decisive between the parties to that proceeding and their privies. * * * It does not follow, because the mandamus was denied, that the Court passed upon the merits of plaintiff's application. That mandamus may

have been denied because no case was made that appealed to the discretionary power of the Court, because relator had a manifest legal remedy of which he could not be deprived, or because mandamus was not the proper remedy."

In a later case the foregoing decision by the Michigan Supreme Court was interpreted as standing for the proposition that in the absence of affirmative testimony it cannot be presumed that an order of the Michigan Supreme Court denying mandamus necessarily decides the merits of the controversy. *Hatch vs. Wayne Circuit Judge, 138 Mich. 184, 101 N.W. 228.* The foregoing considerations do not warrant the inference that the Michigan Supreme Court decided the question of its discretion in favor of petitioner, but rather an opposite conclusion is far more plausible. See *State of Missouri, Ex rel, Gaines vs. Canada, 305 U.S. 337, 83 L. Ed. 208,* where this Court on the basis of a written opinion by the State Court presumed that the procedural question was resolved in favor of the mandamus applicant.

It is submitted that the Supreme Court could properly have denied petitioner's application for mandamus solely as a matter of discretion and that the exercise of such discretion by the State Court should not be disturbed by this Court. See *54 Amer. Juris., Sect. 264, P. 902; Cyc. of Fed. Procedure (2nd Ed.), Sect. 4843, P. 226-227.*

Apart from the foregoing argument, it is entirely possible that the Michigan Supreme Court denied the petitioner's application for mandamus for the simple reason that the proper parties were not before the Court. Reference to the petitioner's application for mandamus as set forth in the record demonstrates that neither the State Board of Agriculture as a group or its members individually had anything whatever to do with the disciplining of the pe-

titioner or in the denial of his re-admittance. All acts complained of by this petitioner relate solely to the action of the President of Michigan State College and its Dean of Students, neither of these individuals having been made parties to the proceeding in the State Court. *Article XI, Sect. 8, Michigan Constitution of 1908,* vests the government of Michigan State College in the State Board of Agriculture. However, *Mich. Comp. Laws of 1929, Sect. 7868, Mich. Stat. Ann. 15.1134,* specifically provides that the faculty shall pass all rules and regulations necessary to the government and discipline of the college and for the preservation of morals, decorum and health. Clearly, the rules and regulations complained of by petitioner fall within the area of rules and regulations necessary for the discipline of the college, the enactment of which is vested in the faculty of Michigan State College. The President and Dean of Students in dealing with the petitioner for the infraction of such rules cannot be said to be acting as the agent for the State Board of Agriculture which had nothing to do with the establishment of petitioner's probationary status or the refusal of his readmittance. No relief by way of mandamus is spelled out against these respondents, and the only two possible parties to such a proceeding were not joined in the action as brought by the petitioner. The Michigan Supreme Court in denying the Writ of Mandamus could properly have passed on this single procedural point and yet have completely disposed of the petitioner's application.

2. Petitioner's petition for certiorari and the record in this cause do not demonstrate that any substantial federal question was presented for the consideration of the Michigan Supreme Court.

It is well settled that certiorari will be directed to the Supreme Court of Michigan only if it can be said that that

Court was confronted with a substantial federal question specially set forth by petitioner for its determination. Simply alleging that the questions presented are substantial in nature is a mere conclusion and does not establish their intrinsic worth. See *10 Cyc. of Fed. Procedure (2nd Ed.) Vol. 10, Sect. 4981, P. 388-389.* Respondents contend that the alleged federal questions as set forth in petitioner's application for mandamus in the State Court are largely conclusions of law unsupported by the facts set forth.

It is a recognized rule of law that a very wide discretion exists on the part of governing boards and officials of institutions of higher learning, in their formulation of rules and regulations pertaining to the government of their respective institutions and the discipline of their students. *Tanton vs. McKenney, 226 Mich. 245, 197 N.W. 510; Woods vs. Simpson, 146 Md. 547, 126 Atl. 882; Waugh vs. Board of Trustees, University of Mississippi, 237 U. S. 589, 59 L. Ed. 731; Gott vs. Berea College, 156 Ky. 376, 161 S.W. 204.* College authorities stand *in loco parentis* to their students insofar as disciplinary powers are concerned and courts are not disposed to interfere with such rules and regulations unless the same are palpably unreasonable or unlawful. *Gott vs. Berea College supra.* Legitimate powers of discipline and regulation over the student body vested in college authorities is not circumscribed by the physical boundaries of the school campus. *Tanton vs. McKenney supra; Steele vs. Sexton, 253 Mich. 32, 234 N. W. 436; Hamilton & Mort, The Law and Public Education, P. 471; Annotation 41 A.L.R., 1312; Waugh vs. Board of Trustees, University of Mississippi supra; Gott vs. Berea College supra.*

Respondents take issue with the statement contained on Page 14 of petitioner's brief to the effect that the petitioner was denied readmittance to Michigan State College solely by reason of his attending a public meeting off campus and

for no other reason. Reference to the respondent's answer to petitioner's application for Mandamus in the Michigan Supreme Court demonstrates that the petitioner, over a great period of time, had been on a strict probationary status by reason of his repeated infractions of school discipline. Respondents contend that petitioner's act, resulting in his being denied readmittance, cannot be divorced from his previous acts in violation of discipline in appraising the propriety of this action. These conditions coupled with the fact that petitioner's academic record deteriorated steadily during the months immediately preceding his being denied readmittance amply suffice to bring such action within the reasonable discretion of the college authorities, and to preclude interference from the courts. See *55 Amer. Juris., Sect. 22, P. 15.*

Respondents submit that, on the face of the record, petitioner's claims that his rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States were violated by the terms of his probation are colorable and devoid of merit. Rather the record shows that the terms of petitioner's probation were calculated to promote that singleness of purpose desired of all students in institutions of higher learning, which attribute was singularly lacking in the petitioner. It is admitted by petitioner that the denial of readmittance resulted from his attending a group meeting which Michigan State College authorities interpreted as violating the terms of his probation. There is nothing to indicate that the nature or the purpose of the meeting had anything to do with the refusal of admission. The President and Dean of Students of Michigan State College construed such activity as a violation of the petitioner's strict probation imposed by reason of petitioner's status as a student at Michigan State College and the disciplinary authority over him arising by reason of his status. The quality of the restrictions imposed upon petitioner cannot

be tested in the light of what would be proper were the same to be imposed upon the body politic.

The privilege of attending Michigan State College is not derived from federal sources, it is accorded by the State of Michigan. See *Hamilton, vs. University of California, 293 U.S. 245, 79 L. Ed. 343.* By accepting the privilege accorded him by the State of Michigan, the petitioner necessarily submitted himself to the broad disciplinary powers of the Michigan State College authorities. Petitioner's unwillingness to submit to the terms of his probation and his contention that the same are unreasonable, presumably because ordinary citizens might challenge such restraints upon their conduct, give rise to no federal questions. If petitioner's colorable assertions to the effect that his constitutional rights were violated in this case be accepted, any aggrieved student who happens to be in an institution of higher learning established by the law of any state may petition this Court and invoke its powers of review over the disciplinary actions of the respective faculties simply by declaring such actions to be unreasonable accompanied by summary declarations that his rights were violated under the Fourteenth Amendment. That such a situation would be subversive of discipline in all state institutions of higher learning, not to mention the secondary and primary schools, requires no further demonstration. Respondents submit that the discipline accorded to petitioner was reasonable and that, in any event, no substantial questions under the First, Fifth and Fourteenth Amendments to the Constitution of the United States are presented.

3. If it can be assumed that the Michigan Supreme Court necessarily decided petitioner's claimed rights under the First, Fifth and Fourteenth amendments adversely to petitioner, such decision was entirely correct on the merits.

Respondents incorporate by reference the authorities and argument contained in the last preceding subdivision of this brief and submit that the President and Dean of Students of Michigan State College in denying readmittance to the petitioner invaded none of petitioner's rights under the Constitution of the United States.

IV.

Conclusion

This case presents important considerations as to the policy of this Court in construing a judgment or order of a State Court of last resort from the standpoint of ascertaining whether or not substantial federal questions are presented in the state forum. More important, however, is the consideration as to the effect which this proceeding may have upon the disciplinary and regulatory powers of state college and state university authorities throughout these United States. Upon this record respondents earnestly submit that this Court in its sound discretion should deny this petition for certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 90

JAMES ZARICHNY,
Petitioner,
vs.
STATE BOARD OF AGRICULTURE and SARAH VAN HOOSEN JONES, WINIFRED G. ARMSTRONG, FOREST H. AKERS, FREDERICK H. MUELLER, CLARK L. BRODY, ELLSWORTH B. MORE, MEMBERS OF THE STATE BOARD OF AGRICULTURE,
Respondents

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

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INDEX

SUBJECT INDEX

TABLE OF CASES CITED

STATUTES CITED

CONSTITUTIONAL CITATIONS

OTHER CITATIONS

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STATEMENT

Respondents in opposing petition for writ of certiorari herein contend that (a) the record in the Michigan Supreme Court fails to show that a substantial federal question was presented and decided, (b) that the decision of

the Michigan Supreme Court "may very well" have been based on nonfederal questions of substantive law and procedure and (c) that even conceding that federal questions were presented to and decided by the Michigan Supreme Court, its decision was correct on the merits.

Petitioner contends that substantial federal questions were presented to and decided by the Michigan Supreme Court and that its decision in denying petitioner's application to obtain reinstatement in Michigan State College by writ of mandamus contravenes rights under the freedom of speech and assembly guaranties of the First Amendment to the United States Constitution, the due process clause of the Fifth Amendment, and the due process, privilege and immunities and equal protection of the law provision of the Fourteenth Amendment.

ARGUMENT

The Substantial Federal Questions

Petitioner was summarily expelled from Michigan State College on the eve of graduation without a hearing (R. 6). His written request for an explanation went unanswered (R. 7).

The Michigan Supreme Court denied petitioner's application for writ of mandamus without opinion (R. 7) and thereafter denied his motion for rehearing without opinion (R. 17). Petitioner was not granted a hearing either with respect to his application for the writ of mandamus or his motion for rehearing (R. 8, R. 17).

Respondents suggest that the writ of mandamus is one of grace rather than one of right and that as the Michigan Supreme Court could have denied petitioner's application for the writ as a matter of discretion, this Court should not disturb the State Court's decision (Respondents' brief, 5).

The fact is, however, that in cases where the duty sought to be enforced is absolute, mandamus is no more a matter of discretion than any other remedy, and that the writ, though a prerogative one, is demandable as of right in a proper case. *Auditor General v. Treasurer,* 73 Mich. 28; *Hamilton v. Secretary of State,* 212 Mich. 31; *Leininger v. Secretary of State,* 316 Mich. 644; cf. *People ex rel. Drake v. Regents,* 4 Mich. 98.

This Court has held that a judgment denying an application for writ of mandamus is final and reviewable. *Hartman v. Greenhow,* 102 U. S. 672.

Petitioner expressly charged in his application for writ of mandamus that he was expelled from the college in violation of his rights under the First, Fifth and Fourteenth Amendments to the United States Constitution (R. 3).

In *Young v. Ragen*, — U. S. —, 69 S. Ct. 1073, where petitions for *habeas corpus* were denied by state courts without a hearing, this Court stated (at p. 1074):

> "• • • it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right."

cf. *Townsend v. Burke*, 334 U. S. 736; *Lovell v. City of Griffin*, 303 U. S. 444; *Broad River Power Co. v. State of South Carolina*, 281 U. S. 537.

See also *Williams v. Kaiser*, 323 U. S. 474, where petition for writ of *habeas corpus* was denied by the state court without a hearing on the ground that it failed to state a cause of action. This Court stated (at p. 479):

> "The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right."

Alleged Nonjoinder of Parties Defendant in State Court Proceeding

For the first time respondents raise in this Court a contention that "it is entirely possible" the Michigan Supreme Court denied petitioner's application for mandamus for the "simple" reason that the proper parties were not before the court. It is suggested that the college president and the dean of students should have been made parties defendants, though it is admitted that government of the

college is vested in the State Board of Agriculture by the Michigan Constitution (Respondents' Brief, 6).

Although Respondents filed a detailed answer to the application for mandamus and a motion to dismiss the same, the contention of nonjoinder was not mentioned (R. 5-15).

The answer to this contention is comparatively simple. In Michigan it is provided by statute that no action at law or in equity shall be defeated by reason of the nonjoinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped as the ends of justice may require. Comp. Laws Mich. 1929, Sec. 12364; M. S. A. 27.665. Moreover, the Michigan Supreme Court may at any time allow new parties to be added or parties to be dropped. Michigan Court Rules, Rule 72, Section 1 (b). Ordinarily if the proper parties plaintiff are not joined, the Supreme Court will direct their joinder on appeal. *Henkel v. Henkel,* 282 Mich. 473. No reason can be seen why this rule would not be applied equally well where there has been a nonjoinder of defendants.

Furthermore, it has been held that the plea of nonjoinder of parties defendant must be raised, if at all, by a plea in abatement. *Dillenbeck v. Simons,* 105 Mich. 373. Admittedly, respondents raised no such plea in the State Court.

In any event, the president of the college (by statute the administrative head: C. L. 1929, Sec. 7867; M. S. A. 15.1133) is *ex-officio* a member of the State Board of Agriculture (Art. XI, Sec. 8, Michigan Constitution) and was therefore effectively before the State Court.

On What Grounds Was Petitioner Expelled Without a Hearing?

Respondents contend that petitioner was expelled (*i. e.* refused readmittance) for violation of strict probation by reason of repeated infractions of school discipline over a great period of time (Respondents' Brief, 7, 8). The act charged as a violation of probation was petitioner's attendance at a public civil rights off campus meeting (Ibid. 8).

Respondents suggest that petitioner's "academic record deteriorated steadily" during the months immediately preceding his being denied readmittance and was an additional justification for the action taken against petitioner by the college authorities (Ibid. 8).

In the letter notifying petitioner that he had been placed on strict probation the following statement appears (R. 5, 6):

> "I am sure that you understand that this action is based solely upon your continued participation in the AYD after it had been refused recognition by the Student Council. Any political beliefs that you may hold play no part in this action, and the Faculty Committee and the College have not been concerned with your membership in any particular party or your allegiance to any particular political group."

Petitioner was not put on probation for any scholastic deficiency and there can be no claim that his scholastic record had anything to do with his expulsion. At the time petitioner was refused readmittance he had completed 183 term credits out of a total of 200 term credits required for graduation (official transcript issued by the Office of the Registrar August 2, 1949) and would have been able to complete the remaining 17 credits and been graduated in another quarter term (Michigan State College Catalog,

1946-1948, Announcements for 1948-1949, pp. 53, 54). The transcript shows above average grades.[1]

Respondents' contention that probation and expulsion were justified on a scholastic basis is of the *post hoc, ergo propter hoc* variety. It may be argued with much greater force that petitioner's grades were the result of the unjust and arbitrary action of the college authorities in keeping petitioner under an unwarranted probation subject to "automatic" suspension in the event of violation (R. 5).

Respondents' contentions as to the grounds for petitioner's expulsion from the college do not stand up under analysis. According to the letter placing petitioner on probation, the sole reason therefor was petitioner's continued participation in the AYD (American Youth for Democracy) after it had been refused recognition by the Student Council (R. 5, 6). The letter notifying petitioner that he had violated his probation and would not be permitted to re-enroll as a student at the college merely stated that petitioner had been permitted to return to college for the Fall 1947 Term on "strict disciplinary probation" and that

> "It has been determined that you have violated the terms of this agreement (sic) and you are hereby notified that because of this violation you will not be permitted to re-enroll as a student at the Michigan State College" (R. 6).

Petitioner was given no inkling as to what he had done or upon what basis it had been determined that he had violated probation. The letter does not disclose how or by whom the determination of violation had been made and

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[1] The transcript shows 60 credit hours of A work, 52 credit hours of B work, 59½ credit hours of C work, 29½ hours of D work (condition). Petitioner failed in seven courses for a total of 24½ hours.

petitioner was given no opportunity for a hearing. His request for particulars went unanswered (R. 7). The threat of "automatic suspension" without specification of charges or an opportunity to be heard was thus carried out.

The material facts are not substantially in dispute. Petitioner and five other students were placed on probation on a charge that they continued activities of the college chapter of American Youth for Democracy after it had been denied recognition by the Student Council (R. 12). AYD was one of three groups seeking recognition on the basis of interest in housing problems, the problems of veterans, racial equality, etc. (R. 11). It was charged in the student newspaper that members of AYD had continued to meet as an organization, and had circulated handbills at an authorized on-campus student rally advocating an FEPC for Michigan (R. 12). Respondents charged that petitioner acknowledged he had been distributing Communist Party literature and soliciting funds from students for subscription thereto (R. 13). Petitioner denied this allegation (R. 15).

In the ensuing months all of the students so placed on probation except petitioner were taken off probation and restored to normal academic status (R. 12).

On December 6, 1948 petitioner attended a meeting off-campus at which one of the 12 Communist leaders indicted by the Federal Court in New York spoke (R. 13). Respondents assert that petitioner arranged for the meeting, planned and conducted the program and made an appeal to the audience for cash contributions to aid in the defense of the 12 (R. 13, 14). Petitioner denied these allegations except that he assisted in arranging for a place for the meeting and that he attended the meeting as a spectator (R. 15). He denied making any appeal for funds and

stated that he rose to protest against such an appeal on the ground that it would only produce trouble (R. 16). Petitioner further pointed out that the meeting in question was not sponsored by any student organization but by the Ingham County Civil Rights Committee; that it was held off the campus; that his right to attend and even to arrange for and plan the meeting was not subject to regulation and control by the college authorities as it related solely to petitioner's private and personal life and that his expulsion therefor constituted an invasion and deprivation of his constitutional rights as set forth in his petition for mandamus (R. 16).

The meeting referred to was held on December 6, 1948. Four days later petitioner was notified in writing that he had violated his probation and would not be permitted to re-enroll as a student (R. 6).

Respondents also charge that in the spring of 1948 petitioner was held in contempt of the Michigan State Senate for his refusal to state whether or not he was a member of the Communist Party, but that in spite of "unfavorable publicity and public clamor" petitioner was permitted to continue as a student at the college as he was not considered to have violated his probation terms by reason of the matter referred to (R. 13).

In his petition for writ of mandamus, petitioner alleged that Michigan State College President Hannah orally informed him that he was expelled because he had broken his agreement to keep "out of the limelight" (R. 2). Respondents in their answer admit this allegation adding that "petitioner was advised that his violation of the terms of his disciplinary probation was the primary reason for refusing to re-admit him as a student" (R. 10).

The foregoing facts do not support President Hannah's disclaimer that petitioner's probation had any political significance (R. 5, 6). Rather they reveal an arbitrary and unreasonable suppression of petitioner's right as an adult citizen to exercise and enjoy his constitutional privileges of free speech and assembly. That this was done under the guise of maintaining discipline in no way alters the fact that petitioner was deprived of his right to receive an education in a state- and federally-supported college on unspecified charges and without a hearing. It is submitted that the right of the governing authorities of a state university to make reasonable rules and regulations for the orderly management of the school and the preservation of discipline must yield to and cannot supersede the overriding right of adult students to enjoy their constitutionally guaranteed rights of free speech and assembly.

It is stated in Respondents' brief (p. 9) that the privilege of attending Michigan State College is not derived from federal sources but is accorded by the State of Michigan. The fact remains, however, that Michigan State College is supported by both state and federal funds (*e. g.*, Public Acts of Michigan, Act 1, 1946 (Ex. Sess.), M. S. A. 15.954 (1)-15.954 (5); U. S. C. A., Title 7, Sections 343c, 343d, 427-427g) and individuals qualified to receive an education there who comply with all reasonable rules, regulations and requirements may not arbitrarily be refused the right to enter and be graduated.

The Michigan Supreme Court Orders Denying Relief Deprives Petitioner of His Constitutional Rights Under the First, Fifth and Fourteenth Amendments

No case can be found to support a contention that the power of governing authorities of educational institutions to expel students is absolute. The rule is clear that no student may be arbitrarily expelled. *55 Am. Jur.* 15; *Baltimore University v. Colton,* 98 Md. 623; *Booker v. Grand Rapids Medical College,* 156 Mich. 95; *50 A. L. R.* 1502. The discretion vested in school authorities to expel students is very broad, but they will not be permitted to act arbitrarily. Whether they have done so under stated circumstances is a question of law for the courts. *Tanton v. McKenny,* 226 Mich. 245.

In *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, this Court answered a contention that the functions of educational officers in states, counties and school districts should not be interfered with (specifically with respect to a compulsory flag salute by school children) as follows (pp. 637, 638):

> "The Fourteenth Amendment as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. *That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.*" (Emphasis added.)

The foregoing stands in strong contrast to the following language in *Tanton v. McKenny, supra,* 226 Mich. 245:

> "It will be remembered also that respect for constituted authority and obedience thereto is an essential lesson to qualify one for the duties of citizenship, and that the schoolroom is an appropriate place to teach that lesson * * *."

Respondents contend that by entering college, petitioner submitted himself to "broad disciplinary powers" of the Michigan State College authorities (Respondents' Brief, 9). Admittedly such disciplinary powers are broad, but not so broad as to exclude judicial review when exercised arbitrarily, unreasonably and unconstitutionally.

CONCLUSION

Respondents fear that if relief is granted petitioner in this case, discipline in all state institutions of higher learning as well as secondary and primary schools would be subverted. It is submitted, however, that if discipline is maintained by arbitrary and unconstitutional measures, it is time to overhaul our educational system so that it may be brought within the ambit of constitutional requirements and to the observance of the Bill of Rights.

For the reasons stated, it is earnestly contended that the writ of certiorari prayed for should be granted.

Respectfully submitted,

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